IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 77-163

ALABAMA DRY DOCK AND SHIPBUILDING CO.,
Petitioner,

versus

FRANK KININESS, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT, FRANK KININESS, IN OPPOSITION

J. Cecil Gardner
DIAMOND, LATTOF & GARDNER
510 Van Antwerp Building
Mobile, Alabama 36601
Counsel for Respondent,
Frank Kininess

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

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OPINIONS BELOW

The opinions below are cited in the Petition and are set forth in full in Appendices "A", "B", and "C" of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the accident and resulting injury sustained by the Respondent, Frank Kininess (Claimant) are within the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act, as amended 1972, Title 33, U.S.C., Sec. 901, *et seq.* (the Act).

2. Whether the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act are constitutional.

STATUTE INVOLVED

The pertinent statute involved is 33 U.S.C., Sec. 901, *et seq.*, as amended 1972, Longshoremen's and Harbor Workers' Compensation Act.

STATEMENT

The facts surrounding the Claimant's accident and resulting injury were not in serious dispute at the formal hearing before the Administrative Law Judge. This litigation concerns the accident and resulting injury sustained by the Respondent, Frank Kininess, while employed by the Petitioner as a painter, scaler and sand blaster. The accident occurred within the confines of the Petitioner's shipyard and at a situs that was a contiguous shipbuilding area which adjoins navigable waters.

Based upon the facts as presented, the Administrative Law Judge found that the accident and in-

jury were within the jurisdiction of the Act, as amended, and his Decision and Order was subsequently affirmed by the Benefits Review Board by Order dated May 18, 1976. The Court of Appeals concluded that Mr. Kininess was entitled to coverage under the Act. The Court of Appeals found that Mr. Kininess was a covered employee as defined in Section 902(3) of the Act; that he was injured at a situs which met the requirements of Section 903(a) of the Act; and that Mr. Kininess was "directly involved" in the Petitioner's shipbuilding and ship repair endeavors. It further determined that the 1972 Amendments to the Act were constitutional.

ARGUMENT

I.

The Decision Below Is Clearly Correct

It is the position of this Respondent that the questions presented by the Petitioner have been fully answered by this Court in its recent Decision of *Northeast Marine Terminal Company, Inc. v. Caputo*, ___ U.S. ___, 45 LW 4729 (June 17, 1977). In that decision, the Court held that the two injured employees satisfied what has come to be called the "status" and "situs" tests. Both were injured ashore in areas adjoining navigable waters, while performing longshoring operations. This Court decided that Mr. Caputo and Mr. Blundo were entitled to the extended coverage of the Act.

Clearly, Mr. Kininess' accident occurred within the confines of the employer's shipbuilding and ship repair premises. The lot in which the crane was

stored was a part of the Petitioner's shipyard and it was not separated from navigable waters by facilities not used for shipbuilding or ship repair. The Court of Appeals correctly affirmed the Administrative Law Judge's finding that the injury occurred in an "adjoining area" within the meaning of Section 903(a).

The Court of Appeals correctly rejected the Petitioner's argument that Mr. Kininess did not satisfy the "status" test as set forth by the Act. This Court in *Northeast Marine Terminal Company, Inc. v. Caputo,* supra, indicated that "the text and the history demonstrate a desire to provide continuous coverage throughout their employment to these amphibious workers who, without the Amendments, would be covered only for part of their activity". At a minimum, the evidence presented indicated that Mr. Kininess spent approximately 25% of his working time for the Petitioner aboard vessels. Certainly, he is the type of employee that Congress intended to cover by the 1972 Amendments to the Act.

Respondent submits that the Court's decision in *Caputo,* supra, of necessity resolves the Petitioner's argument that the 1972 Amendments, are unconstitutional by the very fact that the injured longshoremen in that decision were afforded the extended coverage of the Act as amended despite the occurrence of this injury ashore.

II.

There Is No Conflict Of Decision

Petitioner asserts that the decision in the instant case is contrary to the Fifth Circuit's own decision of

Jacksonville Shipyards v. Skipper, 539 F.2d 533 (5th Cir. 1976). The Court of Appeals properly denied coverage because Mr. Skipper failed to meet the "status" and "situs" tests of the Act. This Respondent submits that the present case is easily distinguished from *Skipper.*

At the time of his injury, Mr. Skipper was assigned work in a disused marine facility. No shipbuilding or ship repair operations were in progress there at the time of his injury. The area in which he was working was across the river from his employer's shipyard. In contrast, Mr. Kininess was injured in a lot in which the crane was being stored. It was a part of the Petitioner's shipyard. The lot was separated from navigable waters only by the shipbuilding and ship repair facilities of the Petitioner.

Mr. Skipper was injured while tearing down a building. The purpose of dismantling this structure was to salvage steel for use in constructing a plant which would manufacture sandblasting equipment. The plant was a new business venture of Jacksonville Shipyards, Inc. and it had no direct connection with the shipbuilding and ship repair work of Jacksonville Shipyards, Inc. The purpose of Mr. Skipper's duties was to provide materials for a plant which would manufacture equipment, not ships. The Court of Appeals correctly distinguished the two cases at page 3825, slip opinion (Appendix pages 3a-4a). In Mr. Kininess' case, he was maintaining a crane whose use in the future would be limited solely to aiding the Petitioner's shipbuilding and ship repair endeavors. The purpose of Mr. Kininess' duty was to further the

Petitioner's shipbuilding and ship repair interest by maintaining this crane pending use.

The Court of Appeals properly considered *Skipper* when addressing itself to the instant decision. Hence the Petitioner's argument is without merit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

J. Cecil Gardner
DIAMOND, LATTOF &
GARDNER
510 Van Antwerp Building
Mobile, Alabama 36601
Counsel for Respondent,
Frank Kininess

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served on all counsel of record, postage prepaid, this 31st day of August, 1977

J. Cecil Gardner